No. 95-163

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ZONING BOARD OF ADJUSTMENT FOR THE TOWNSHIP OF WEST AMWELL, HARRY K. RUSH, RAYMOND G. LINDBLAD, CHARLES A. BRITTON, GARY W. BLEACHER, DAVID L. DONDERO, STEWART PALILONIS, ROBERT FULPER, JR., WERNER J. HOFF, EUGENE J. VENETTONE, BARBARA GILL, JOSEPH HELEWA,

Petitioners,

—v.—

ALFRED DEBLASIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION BY THE NEW JERSEY STATE LEAGUE OF MUNICIPALITIES TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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The New Jersey State League of Municipalities ("the League") moves the Court for permission to file an *amicus curiae* brief in support of the petition for a writ of certiorari filed by the Zoning Board of Adjustment for the Township of West Amwell, the volunteer members of the Zoning Board, the Zoning Board's attorney and the Township's building inspector. Petitioners have consented to the League's filing an *amicus* brief in support of the petition. The League sought

consent from respondent but he declined. Leave to file is therefore sought pursuant to Rule 37.2 of this Court.

NATURE OF APPLICANT'S INTEREST

The League is an organization of over 560 New Jersey municipalities, organized to address legal, political and social issues of vital importance to New Jersey communities. The League's policy is to file *amicus* briefs when, and only when, important issues affecting New Jersey's municipalities are presented. In particular, it has appeared before the Supreme Court of New Jersey in numerous cases of prime importance to municipalities.[1] On several occasions, the Supreme Court of New Jersey *sua sponte* has asked the League to appear as *amicus curiae*.[2]

The League has taken an active interest in zoning and land use issues which, as this Court has recognized, is perhaps "the most essential function performed by local government."[3] Because of the importance of zoning issues to municipalities --and the frequency with which they arise --

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[1] *See, e.g., Morton International Inc. v. General Accident Ins. Co.*, 134 N.J. 1 (1993); *Rochinsky v. New Jersey Dep't of Transportation*, 110 N.J. 399 (1988).

[2] *See, e.g., New Jersey Transit Corp. v. Borough of Somerville*, 139 N.J. 582 (1995).

[3] *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting) ("I am in full agreement with the majority that zoning . . . may indeed be the most essential function performed by local government.").

the League has appeared as *amicus* in a variety of zoning cases before the Supreme Court of New Jersey and the Appellate Division of the Superior Court of New Jersey.[4]

The League's role in the use of the civil rights laws to resolve land use issues is of particular relevance to this case. The League appeared as *amicus* in the leading New Jersey state court decision on the use of 42 U.S.C. §1983 to resolve zoning disputes. *See Anastasio v. Planning Board of West Orange*, 209 N.J. Super. 499 (App. Div.), *cert. denied*, 107 N.J. 46 (1986). Most recently, it filed an *amicus* brief with the Supreme Court of New Jersey on a §1983 claim similar to that presented by the petition before this Court -- a local government official who voted against plaintiff on an application was allegedly biased and should have recused himself. *Rivkin v. Dover Township Rent Leveling Board*, 277 N.J. Super. 559 (App. Div. 1994).

The members of the League are seriously concerned about the increasing use of §1983 for local land use issues and the impact it has on their budgets and their ability to attract good

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[4] *See, e.g., The Great Atlantic & Pacific Tea Co. v. Borough of Point Pleasant*, 137 N.J. 136 (1994); *Urban v. Planning Board of the Borough of Manasquan*, 124 N.J. 651 (1991); *Kaufmann v. Planning Board for Warren Township*, 110 N.J. 551 (1988); *Committee for a Rickel Alternative v. City of Linden*, 214 N.J. Super. 631 (App. Div. 1987).

people to local government, particularly in the zoning area where officials, like petitioners here, often serve on a volunteer basis.

Respectfully submitted,

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BRIEF OF THE NEW JERSEY STATE LEAGUE OF MUNICIPALITIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The New Jersey State League of Municipalities ("the League") respectfully submits this brief as *amicus curiae* in support of the petition for certiorari filed by the Zoning Board of Adjustment for the Township of West Amwell, the volunteer members of the Zoning Board, the Zoning Board's attorney and the Township's building inspector.

INTEREST OF AMICUS CURIAE

The applicant's interest is stated in the accompanying motion.

SUMMARY OF ARGUMENT

This case arises from a homeowner's complaint about the activities of a neighboring landowner and the landowner's resulting application for a zoning variance, which was denied by the local Zoning Board of Adjustment. Review of variance applications is the main function of local Zoning Boards in New Jersey and elsewhere and is the type of issue they confront on a regular and recurring basis. In New Jersey, a disappointed applicant has the right to seek review of the zoning Board's decision in the Superior Court of New Jersey, a right that the landowner here chose not to pursue. The question presented by this case is whether and when an unsuccessful applicant should also have the right to assert a substantive due process claim in addition to his state court remedy.

With increasing frequency disgruntled landowners and developers are turning to the substantive due process clause and 42 U.S.C. §1983 as the preferred method of litigating zoning disputes. The reasons are obvious and include:

- the ability to recover their attorney's fees under 42 U.S.C. §1988;

- the ability to seek damages against local officials in their individual capacity;

- the ability to embroil the municipality in protracted litigation through burdensome and time-consuming discovery;

- the ability to take the municipality out of the familiar setting of the local state court and into the less familiar and sometimes distant federal court;

- the ability to avoid the presumption of validity which attaches to local agency decisions in state court.[1]

By raising the stakes, civil rights claims are an excellent way to pressure a municipality in a zoning dispute and the lawyers who make a living representing disappointed applicants know it. Moreover, "[t]he possibility of facing expensive and aggravating litigation as a result of making a decision on an application for development may in a subtle way impact on the decision making process." *Anastasio v. Planning Board of Township of West Orange*, 209 N.J. Super. 499, 526 (App. Div.), *cert. denied*, 107 N.J. 46 (1986).

The increasing use of the substantive due process clause for zoning disputes is best demonstrated by the growing number of reported and conflicting decisions from the Circuits attempting to apply the clause in this context. Guidance from this Court is desperately needed to bring order to the confusion created by the conflicting Circuit and state

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[1] *Kramer v. Board of Adjustment, Sea Girt*, 45 N.J. 268, 296 (1965).

court positions. In particular, this Court should clarify the following issues for the Circuits and the local municipalities and local officials who may be subject to damage and attorney's fee claims for any misstep in this area.

First, this Court's recent opinion in *Albright v. Oliver*, 114 S. Ct. 807 (1994), suggests that the generalized notion of substantive due process should not be used to resolve land use disputes in light of the explicit protection for excessive land use regulation in the takings clause of the Fifth Amendment. *Albright* was decided after the parties briefed the case below in the Third Circuit and is not cited in the Third Circuit's decision.

Second, if there is a substantive due process claim for zoning disputes, then it should be conditioned on having a "fundamental right" at stake. The law in the Circuits on this particular issue is in chaos and uniformity is needed on this critical issue.

Finally, if there is a substantive due process claim for zoning disputes, and if such a claim does *not* require a "fundamental right" to be at stake, then it should be conditioned on the state remedy being inadequate. Here again, there is confusion in the circuits. There also is a dramatic conflict between the Third Circuit and the New Jersey state courts on this aspect of §1983 with the end result being that zoning plaintiffs have a much greater incentive to file their substantive due process claim in federal court rather than state court, where zoning claims have historically been resolved. This reversal of roles is inimical to the concept of federalism and this Court should resolve the conflict causing it.

POINT I

GENERALIZED NOTIONS OF SUBSTANTIVE DUE PROCESS SHOULD NOT BE USED FOR LAND USE DISPUTES

In 1992, the Sixth Circuit made a herculean effort to summarize the conflicting positions of the Circuits on the use of the substantive due process clause for zoning cases. *See Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1215-18 (6th Cir. 1992). Since then, as petitioners point out, the disharmony has increased. *See* Petition at 13-14.

Lurking in this morass is a larger question -- whether the substantive due process clause should ever be used for land use disputes. "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992).

This Court's recent decision in *Albright v. Oliver*, 114 S. Ct. 807 (1994), suggests that larger question has to be answered and provides even more reason for the Court to take this case and end the confusion.[2] *Albright* is the latest decision to hold that the substantive due process clause should

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[2] Although the Third Circuit's decision in *Deblasio* was decided some 16 months after *Albright*, the Third Circuit never cited it, no doubt because *Deblasio* was briefed before *Albright* was decided. In short, it does not appear that the Third Circuit was aware of *Albright* when it decided *Deblasio*.

not be used to analyze claims that are covered by another, specific provision in the Constitution. The plaintiff in *Albright* asserted a substantive due process claim for being subjected to criminal charges without probable cause. Seven members of the Court agreed that the substantive due process claim should be dismissed as a matter of law. Chief Justice Rehnquist's plurality opinion (joined in by Justices O'Connor, Scalia and Ginsberg) found the existence of the Fourth Amendment's more specific provisions fatal to assertion of a generalized substantive due process claim:

> It was through [the] provisions of the Bill of Rights that [the] Framers sought to restrict the exercise of arbitrary authority by the Government in particular situations. Where a particular amendment "provides an explicit textual source of constitutional protection" against a particular sort of government behavior, "that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."

Id. at 813 (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)).

Justice Kennedy, joined by Justice Thomas, agreed "with the plurality that an allegation of arrest without probable cause must be analyzed under the Fourth Amendment without reference to more general considerations of due process." *Id.* at 817 (Kennedy, J. concurring). Justice Souter likewise noted the Court's tradition of "reserving due process for otherwise homeless substantial claims." *Id.* at 820 (Souter, J., concurring).

With respect to zoning, the Bill of Rights contains a specific provision for arbitrary and irrational land use decisions by municipalities. The takings clause of the Fifth Amendment provides in pertinent part:

> nor shall private property be taken for public use, without just compensation.[3]

In the words of *Albright*, because the takings clause "provides an explicit textual source of constitutional protection" from overzealous or misguided zoning officials, that clause, and "not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."

In recent years, this Court has not hesitated to use the takings clause to invalidate arbitrary action by local officials with respect to zoning issues. *See Dolan v. City of Tigard, 114 S. Ct. 2309 (1994)* (City Planning Commission conditioned approval of landowner's application to expand her store and pave her parking lot upon the landowner dedicating a public greenway and a pedestrian/bicycle pathway); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (Coastal Commission conditioned approval of homeowners' rebuilding permit upon homeowners allowing the public an easement to pass across their beach); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) (clause extends to temporary takings).

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[3] The takings clause has been made applicable to the States through the Fourteenth Amendment. *See Chicago B & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

To be sure, some local actions are not severe enough to constitute a taking but yet still burden a property owner. Those local actions, however, should not be subject to a substantive due process challenge where, as here, New Jersey provides a "safety valve" in the form of the variance application process by which the property owner can seek relief from that burden from the local agency and appeal any adverse decision to the Superior Court. *See* Rohan, 6 Zoning and Land Use Controls, §43.01[3] (1995).

This conclusion is bolstered by local government's historical and primary role in land use regulation. Justice Marshall was no doubt correct when he stated:

> I am in full agreement with the majority that zoning . . . may indeed be the most essential function performed by local government.

Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting). *Accord, FERC v. Mississippi, 456 U.S. 742, 768 n.30 (1982)* ("regulation of land use is perhaps the quintessential state activity"). Local government's special and unique role in the zoning field counsels against the use of a substantive due process cause of action as a supplement to the remedies provided by the takings clause and state law. *See Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225-26 (1985) (noting "the prerogatives of state and local educational institutions" and stating "Considerations of profound importance counsel restrained judicial review of the substance of academic decisions.")

POINT II

ALBRIGHT PROVIDES ADDITIONAL REASON FOR REVIEWING THE PROPERTY INTEREST QUESTION

If a substantive due process claim exists for zoning disputes, the next issue is the nature of the property or other interest required in order to assert such a claim. As petitioners aptly point out, the Circuits are hopelessly splintered as to the nature of the interest required for a substantive due process claim in the zoning area. In 1995 alone, three Circuits have taken three different approaches to the issue.[4]

Here again, this Court's decision in *Albright* suggests a solution and supports a decision to take this case and bring some much needed harmony to this important area of constitutional law. Chief Justice Rehnquist's plurality opinion (joined by O'Connor, Scalia and Ginsberg) indicates that unlike a procedural due process claim, a substantive due process claim lies only where a "fundamental right" is at stake:

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[4] *Compare Deblasio v. Zoning Board of Adjustment for the Township of West Amwell*, 53 F.3d 592 (3d Cir. 1995) (applying "mere ownership" test) *with Mid-American Waste Systems, Inc. v. City of Gary*, 49 F.3d 286 (7th Cir. 1995) (applying "fundamental rights" test) *and Triomphe Investors v. City of Northwood*, 49 F.3d 198 (6th Cir. 1995) (applying "legitimate entitlement" test).

> The protection of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity.

114 S. Ct. at 812. *See, e.g., Planned Parenthood of Southeastern, Pa. v. Casey*, 112 S. Ct. 2791 (1992) (describing cases in which substantive due process rights have been recognized); *Regents of University of Michigan*, 474 U.S. at 228-29 (Powell, J. concurring) (While property interests for procedural due process purposes are created by state law, "substantive due process rights are created only by the Constitution.")

The "mere ownership" test adapted by the Third Circuit in this case can not be reconciled with this Court's recent writings on the substantive due process clause. Moreover, petitioners are clearly correct when they argue that the "mere ownership" standard is really no standard at all. *See* Petition at 14-15. In essence, it permits any landowner to transform any routine zoning dispute into a substantive due process claim, thereby placing it on the same plane as fundamental rights relating to marriage, family, procreation, and bodily integrity. This dramatic expansion of substantive due process needs to be addressed by this Court.

POINT III

THERE IS A SPLIT IN THE LOWER COURTS OVER THE IMPACT OF AN ADEQUATE STATE REMEDY ON A SUBSTANTIVE DUE PROCESS CLAIM

A. Justice Kennedy's and Thomas' Concurring Opinion in *Albright*

If a substantive due process claim exists for zoning disputes, and if such a claim is not limited by the "fundamental rights" test advocated above, then it should be available only if state law does not provide an adequate remedy. The adequacy of state remedies is a relevant factor in reviewing constitutional claims under both the takings clause, *see Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 196-97 (1985), and the due process clause. *See Parratt v. Taylor*, 451 U.S. 527, 535-44 (1981); *Hudson v. Palmer*, 468 U.S. 517, 531-36 (1984).

Justice Kennedy's and Thomas' concurring opinion in *Albright* support the proposition that the *Parratt* doctrine should apply to substantive due process claims for zoning issues if such claims can be asserted when "fundamental rights" are not at stake.

> The commonsense teaching of *Parratt* is that some questions of *property*, contract, and tort law are best resolved by state legal systems without resort to the federal courts, even when a state actor is the alleged wrongdoer. . . . The *Parratt* principle respects the delicate balance between state and federal courts and comports with the design of §1983, a statute

> that reinforces a legal tradition in which protection for persons and their rights is afforded by the common law and the laws of the States, as well as by the Constitution.

114 S. Ct. at 818-19 (emphasis added).

Moreover, Justices Kennedy and Thomas correctly pointed out that the "*Parratt* rule has been avoided by attaching a substantive rather than procedural label to due process claims (a distinction that if accepted in this context could render *Parratt* a dead letter)." *Id.* at 819. The instant case is an excellent example of that very problem. The essence of plaintiff's claim is that a local official was biased and should have recused himself. The right to an impartial decisionmaker has traditionally been considered a component of "procedural" due process. *See Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

In this case, however, plaintiff styled his claim as both a procedural and a substantive due process violation. The Third Circuit dismissed the procedural due process claim because New Jersey zoning law provided an adequate remedy for this violation. But when it considered the same claim under a substantive due process label, the adequacy of the state remedy played no role in the analysis.

This result makes no sense. If the state provides an adequate remedy for a procedural due process violation arising from a biased decisionmaker, then surely that remedy is just as adequate if the same claim is called a substantive due process violation. The *Parratt* doctrine should apply to both procedural and substantive due process claims, unless a

fundamental right is at stake. *But see Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (5-4 decision).

B. The Split In The Circuits

Unlike the Third Circuit, where the *Parratt* doctrine seems to have no bearing on a substantive due process zoning claim, a post-*Zinermon* decision from the Seventh Circuit continues to require the developer to demonstrate the inadequacy of state remedies before pursuing a substantive due process claim. *See New Burnham Praire Homes, Inc. v. Village of Burnham*, 910 F.2d 1474, 1479 (7th Cir. 1990). A post-*Zinermon* decision from the Sixth Circuit also has relied on the adequacy of state remedies to dismiss a substantive due process claim where a fundamental right was not at stake. *See United of Omaha Life Ins. Co. v. Solomon*, 960 F.2d 31, 35 (6th Cir. 1992). *See also McKinney v. Pate*, 985 F.2d 1502, 1507-15 (11th Cir.) (Tjoflat, C.J., concurring) (noting the problems in this area when substantive due process is not limited to fundamental rights), *vacated*, 994 F.2d 772 (11th Cir. 1993) (en banc), *superseded by*, 20 F.3d 1550, 1556-57 (11th Cir. 1994) (en banc) (substantive due process applies only to fundamental rights; therefore adequacy of state remedies is irrelevant).

C. The Split Between The Third Circuit And The New Jersey State Courts

Even more significant, at least for purposes of federalism, is the split on this issue between the Third Circuit and the New Jersey state courts. In the Third Circuit

> a land-owning plaintiff states a substantive due process claim where he or she alleges that the

> decision limiting the intended land use was arbitrarily or irrationally reached. Where the plaintiff so alleges, the plaintiff has, as a matter of law, impliedly established possession of a property interest worthy of substantive due process protection.

Deblasio, 53 F.3d at 601.[5] And as *Deblasio* and earlier Third Circuit cases demonstrate, those substantive due process claims often survive summary judgment motions because of issues of fact.[6]

Unlike the Third Circuit, where the adequacy of a state remedy for an arbitrary zoning decision seems to be

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[5] *Accord, Bensalem Road Corp. v. Bensalem Township*, 57 F.3d 253 (3d Cir. 1995) (developer who had been denied building permits stated a substantive due process claim by alleging that officials did so for reasons unrelated to the merits); *Neiderhiser v. Borough of Berwick*, 840 F.2d 213 (3d Cir.), *cert. denied*, 488 U.S. 822 (1988) (lessor who had been denied an exemption from a zoning ordinance stated a substantive due process claim by alleging that the exemption was arbitrarily and irrationally denied); *Bello v. Walker*, 840 F.2d 1124 (3d Cir.), *cert. denied*, 488 U.S. 868 (1988) (developer who had been denied a building permit application stated a substantive due process claim by alleging arbitrary abuse of power by municipal official).

[6] *See, e.g., Bensalem*, 57 F.3d 253 (reversing dismissal and ordering a third trial); *Neiderhiser*, 840 F.2d 213 (denying summary judgment motion on substantive due process claim); *Bello*, 840 F.2d 1124 (same).

irrelevant, that is the critical factor for the New Jersey state courts when they apply §1983 to zoning claims. This is perhaps explained by the state court's familiarity with, and confidence in, the New Jersey state law remedy for correcting zoning mistakes by local officials. A brief discussion of that remedy is therefore in order.

In New Jersey, the actions of municipal agencies and officials are subject to review in the Superior Court, in an action in lieu of prerogative writs.[7] *See generally Alexander's v. Borough of Paramus*, 125 N.J. 100, 107-08 (1991). The trial court's review of the municipal action is based on the record below, and the agency's determination is set aside if it is arbitrary, capricious or unreasonable, not supported in the evidence, or otherwise contrary to law. *See, e.g., Rivkin v. Dover Township Rent Leveling Board*, 277 N.J. Super. 559, 569 (App. Div. 1994).

Prerogative writ actions are available to protect "an aggrieved citizen from almost every form of improper official action." *Ward v. Keenan*, 3 N.J. 298, 308 (1949). The Supreme Court of New Jersey has described the prerogative court action as a "safeguard of liberty" and "one of the best of all the securities for the maintenance of the supremacy of the law." *Id.* (quoting Holdsworth, 10 History of English Law 517).

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[7] The prerogative writs are *certiorari, quo warranto, prohibition* and *mandamus*. They were superseded by the New Jersey Constitution in 1947 which provided for "review, hearing and relief" in the Superior Court in lieu of the superseded writs. N.J. Const. art. VI §5, ¶4.

In contrast to federal civil rights litigation, the prerogative writ action was designed for deliberate speed. In fact, the current system for prerogative writ actions was created by the New Jersey Constitution of 1947, in part because of dissatisfaction over the delays inherent in the former system. *See Ward*, 3 N.J. at 304-05. The drafters of the 1947 Constitution recognized that "[t]hese cases are required to be decided promptly as befits the transaction of important public business." *Id.* at 305.

Thus, while a plaintiff has a two year statute of limitations in the Third Circuit for bringing a §1983 claim, *Genty v. RTC* 937 F.2d 899, 919 (3d Cir. 1991), a prerogative writ claim generally must be brought within 45 days of the adverse municipal action. New Jersey Court Rule 4:69-6(a). While a civil rights plaintiff can take full advantage of the discovery available under the federal rules, the general rule in prerogative writ actions is that there is no discovery and the trial court is limited to the record developed by the parties before the municipal agency. *Kramer v. Board of Adjustment, Sea Girt*, 45 N.J. 268 (1965).

As the Appellate Division recently recognized, the prerogative writ action is, in certain respects, *more* effective than a money damage claim under §1983 for correcting due process violations:

> The review of agency determinations afforded in actions in lieu of prerogative writs is a more effective postdeprivation remedy than the postdeprivation tort claims that ware available to the plaintiffs in *Parratt* and *Hudson*. . . . The tort remedy is indirect; it redresses the violation of a plaintiff's rights with a payment

> of money. The action in lieu of prerogative writs provides a direct remedy; it substantially restores the status quo by overturning the agency ruling that was the fruit of the due process deprivation.

Rivkin, 277 N.J. Super. at 569-70.[8]

Given the powerful and speedy nature of this remedy, it is not surprising that the New Jersey state courts have deemed it to be an adequate remedy for zoning and other local agency abuses, thereby obviating the need for a due process claim. The leading decision is *Anastasio v. Planning Board of Township of West Orange*, 209 N.J. Super. 499, 521 (App. Div.), *cert. denied*, 107 N.J. 46 (1986), where a developer filed a §1983 damage claim against various municipal officials because they had denied the developer's request for site plan approval. The trial court found that the municipal officials "were acting with malicious intent which resulted in depriving plaintiffs of their rights," *id.* at 515, and a compensatory and punitive damage award was entered.

The Appellate Division reversed the finding of §1983 liability because the prerogative writ action provided an adequate remedy:

> New Jersey law granted the victim of such a mistaken action a complete remedy, so there

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[8] To the extent damages are relevant, the New Jersey Tort Claims Act provides a damage remedy against municipalities and local officials subject to the immunity provisions of that Act. *See* N.J.S.A. 59:1-1 et seq.

> was no deprivation of any interest, only a delay.

Id. at 522 (citing *Parratt*). Subsequent New Jersey decisions have consistently rejected §1983 claims for arbitrary and capricious action by municipal officials because review of that action was available in a prerogative writ action.[9] As the Appellate Division stated:

> If we were to hold a municipal agency liable under 42 U.S.C. §1983 merely for mistakenly exercising power under state law remediable under state law, public entities on all levels would face a myriad of potential claims and would serve at great financial peril. . . . We do not believe that Congress intended such broad liability for ordinary governmental decisions.

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[9] *See Bernardsville Quarry, Inc. v. Bernardsville Borough*, 129 N.J. 221, 246-47 (1992) (affirming Appellate Division's denial of §1983 claim for arbitrary and capricious denial of license under a quarry ordinance because "the availability of review of that action in the Superior Court prevented such alleged violation from being actionable under [§1983]."); *Rivkin*, 277 N.J. Super. at 569-70 (prerogative writ action provides adequate post-deprivation remedy for a claim that member of rent leveling board had a conflict of interest); *Silverman v. Rent Leveling Board of Cliffside Park*, 277 N.J. Super. 524, 537-38 (App. Div. 1994) (prerogative writ action provides adequate post-deprivation remedy for a claim that Mayor and Council arbitrarily denied application for a rent hardship increase).

Silverman v. Rent Leveling Board of Cliffside Park, 277 N.J. Super. 524, 538 (App. Div. 1994).

In sum, the contrast between the Third Circuit law and the New Jersey state court law is dangerously dramatic. We say "dangerously" because it invites zoning plaintiffs to file zoning cases in federal court rather than state court where they have historically been resolved. This Court should resolve this conflict --as well as the conflict among the Circuits -- and bring some much-needed uniformity to this area of the law that is of the utmost importance to local government.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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